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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 786

RALPH B. CARNES AND ROGER W. SMALLWOOD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 382–391; Pet. App. A3–A11) is reported at 295 F. 2d 598.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1961 (R. 392; Pet. App. A1), and a petition for rehearing was denied on January 11, 1962 (R. 409; Pet. App. A1). On February 1, 1962, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including March 12, 1962 (Pet. App. A2), and the petition was filed on March 9,

1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal officer's recording of a telephone conversation between himself and a person whom he has under investigation, without the person's knowledge, by a recording device attached to the earpiece of the officer's telephone instrument, constitutes the interception of a communication within the meaning of Section 605 of the Communications Act of 1934.

STATUTE INVOLVED

Section 605 of the Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. 605, provides in pertinent part:

> * * * [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *.

STATEMENT

Count 1 of a five-count indictment (R. 1–8), filed June 5, 1959, in the United States District Court for the Northern District of Georgia, charged petitioners and six other defendants with having conspired, from August 1 to November 30, 1958, to defraud the United States and to commit offenses against the United States pertaining to the manufacture, possession, transportation, distribution and sale of non-tax-paid

distilled spirits,[1] in violation of 18 U.S.C. 371 (R. 1–6). Counts 2 and 4 (R. 6, 7) charged petitioners and one of the other defendants, John Whitley, with possessing non-tax-paid distilled spirits and an unregistered distillery on September 10, 1958, in violation of Sections 5008 and 5601 of the Internal Revenue Code of 1954 (26 U.S.C. (1952 ed., Supp. V) 5008 and 5601). The remaining counts—3 and 5—did not involve either petitioner. Following a trial by jury, both petitioners were found guilty on the conspiracy count, and petitioner Smallwood was found guilty on counts 2 and 4 (R. 364).[2] Petitioner Carnes was sentenced to four years' imprisonment (R. 366–367). Smallwood was sentenced generally to three years' imprisonment and to pay a fine of $500 (R. 368–369). The United States Court of Appeals for the Fifth Circuit affirmed the convictions (R. 382–392; Pet. App. A1, A3–A11).

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[1] The substantive offenses charged included violations of the following sections of the Internal Revenue Code of 1954 (26 U.S.C. (1952 ed., Supp. V)): Section 5008 (transporting, possessing, and selling distilled spirits in containers not bearing stamps evidencing compliance with internal revenue regulations), Sections 5174(a) and 5601 (possession of unregistered stills and distilling apparatus), Section 5216 (making mash fit for distillation in premises other than duly authorized distilleries), Section 5606 (carrying on the business of a distiller without having given bond), Section 5691 (carrying on the *business of a wholesale liquor dealer* without having paid the special tax required by law), Section 7206 (removing, depositing, and concealing distilled spirits in respect of which a tax is imposed, with intent to evade or defeat the tax), and Section 7201 (attempting to evade and defeat taxes on distilled spirits).

[2] Petitioner Carnes was acquitted by direction of the court on counts 2 and 4 (R. 363).

The evidence presented by the government at the trial may be summarized as follows:

On September 10, 1958, officers of the Alcohol and Tobacco Tax Division of the Treasury Department raided and destroyed a large non-registered still located adjacent to property owned by petitioner Smallwood. They discovered 403½ gallons of non-tax-paid whiskey in a nearby barn and rounded up several persons implicated in the operation of the still, including Smallwood and John Whitley, a co-defendant. Whitley, when arrested, was driving a truck owned by Smallwood, in which were 1,060 pounds of sugar and two tins of dry yeast, materials used in the operation of a still. A truck which had previously been seen in the possession of petitioner Carnes was found in the barn in which the whiskey was discovered. (R. 18–22, 24, 26–31, 39–41, 45–47, 50–51, 68–69, 89, 267–268, 331; G. Ex. 3, R. 118–119.)

Destruction of the still merely slowed down the participants' operations. On September 30, Atlanta policemen found Whitley driving an automobile containing 158 gallons of non-tax-paid whiskey (R. 82–83). During this period numerous telephone calls were made between a grocery supermarket operated by Carnes and the Smallwood residence (G. Exs. 4 and 7, R. 120, 130, 156–157, 186; R. 383; Pet. App. A4).

In October, John Wurtele, a special investigator for the Alcohol and Tobacco Tax Division, "posing as a transporter of non-tax-paid whiskey," communicated with Carnes through Whitley in an attempt to purchase whiskey from Carnes. His efforts were successful, and after a time Wurtele dealt with Carnes

directly. On October 7, 8, 10, and 27, Wurtele made four substantial purchases of non-tax-paid whiskey from Carnes, ranging in quantity from nine to sixteen cases, for which Wurtele paid associates of Carnes sums ranging from $161 to $288. (R. 193–201.) On October 30, other revenue officers, using the information obtained by Wurtele in the course of his October 27 purchase, located and destroyed the distillery from which that liquor had come (R. 148–151, 153–155, 201). A third still, at which Whitley was found working, was seized on November 26 (R. 134–135, 165–166).

On October 27, Wurtele called Carnes from an outdoors telephone booth. Referring to some whiskey which he had agreed to purchase, Wurtele asked Carnes if "the stuff" was ready. Carnes said it was, and Wurtele said he would arrive in 45 minutes to pick it up. (R. 200, 229.) On October 29, Wurtele again called Carnes, from a pay station in a building in Atlanta. Referring to another consignment of liquor which he had made arrangements to buy, Wurtele told Carnes that he was "afraid to come down and load up" because he had been stopped by "the law," and asked Carnes to "have the boys * * * hold the whiskey until Friday." Carnes "said that he would." (R. 201, 229.) Wurtele recorded both of these conversations with a "small midget-tape recorder that you connect to the telephone ear piece" (R. 200, 201, 206).[1] The recordings were received in evidence over objection (G. Ex. 8, R. 209, 214–217), and played to the jury (R. 220–221).

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[1] The recordation process did not entail the cutting or splicing of any wires (R. 219).

ARGUMENT

Petitioners contend (Pet. 6–11) that it was error to admit in evidence the tape-recordings made by investigator Wurtele of his telephone conversations with petitioner Carnes on October 27 and 29, 1958.[4] They urge that the playing of these recordings at the trial involved the divulgence, in each instance, of an "intercepted communication" within the meaning of Section 605 of the Communications Act of 1934 (*supra*, p. 2), and hence was prohibited under the rule of *Nardone* v. *United States*, 302 U.S. 379. The argument is without merit.

The recording by Wurtele of his own conversations with Carnes did not involve the interception of a communication. As a party to the conversations, Wurtele had a right to divulge their content to whomever he chose. "The communication itself is not privileged," this Court observed in *Rathbun* v. *United States*, 355 U.S. 107, 110, "and one party may not force the other to secrecy merely by using a telephone." There can be no question that it was proper for the officer to testify from memory, as he did, to the relevant substance of what he said to the other party to these communications and what that party said to him. Petitioners do not contend otherwise. The officer's

[4] We shall assume, *arguendo*, that both petitioners had standing to object to the admission of the recordings, even though only petitioner Carnes was a party to the conversations and petitioner Smallwood was not mentioned or referred to, directly or indirectly, in either conversation (R. 220–221). But see *Goldstein* v. *United States*, 316 U.S. 114, 119–122; cf. *Jones* v. *United States*, 362 U.S. 257, 261; *Agnello* v. *United States*, 269 U.S. 20, 35; *Hale* v. *Henkel*, 201 U.S. 43, 70.

action in recording the conversations was no different, in legal effect, than if he had taken stenographic notes, or committed the conversations to memory, and thereafter testified to his communicant's exact words. In recording the conversations, he merely made permanent and reliable records of communications which, because he himself was a party to them, he was at liberty to publish to whom he chose.

These conclusions follow *a fortiori* from *Rathbun* v. *United States*, *supra*. At issue there was the admissibility of police officers' testimony of statements they heard the accused make by telephone to a third person by listening on an extension in the home of the third person, at the latter's request and without the knowledge of the accused. The Court, resolving a conflict which had arisen among the lower courts on the question, sustained the admissibility of the officers' testimony. It concluded (355 U.S. at 111):

> Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. Consequently, one element of Section 605, *interception*, has not occurred. [Emphasis by the Court.]

In *Rathbun*, the police officers, from the point of view of the accused, were eavesdroppers on what the

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The Court upheld what had been the majority view. (355 U.S. at 109, nn. 4 and 5). See also the opinion below at R. 385-388, Pet. App. A5-A8.

accused supposed was a private telephone conversation between himself and a third person. In the case at bar, no third person was involved. Investigator Wurtele was a party to the conversations. It is true that the other party was unaware that Wurtele was an undercover agent, engaged in the enforcement of the internal revenue laws. But the fact that Wurtele, in his relations with Carnes, had assumed the role of an interested purchaser of Carnes' non-tax-paid product did not affect the situation so far as the applicability of Section 605 of the Communications Act was concerned. That "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises" (*Sorrells* v. *United States*, 287 U.S. 435, 441) is well settled. The situation at bar is thus, in legal effect, not materially different than if the conversations had been face-to-face communications, recorded by a device concealed on Wurtele's person. Cf. *On Lee* v. *United States*, 343 U.S. 747. The fact that the conversations recorded were telephone conversations is without relevance.[8]

That the situation involved in the present case is controlled by *Rathbun* was, indeed, recognized by the Court in that case. The Court noted that it had been "conceded by those who believe the conduct here violates Section 605 that either party may record the conversation and publish it" (355 U.S. at 110).

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[8] Neither in the courts below nor in this Court has any question been raised as to the possible applicability of regulations of the Federal Communications Commission concerning the use of telephone recording equipment; such equipment is required to contain a tone-warning device. See *In the Matter of Use of Recording*

Moreover, in the dissenting opinion in that case, it was acknowledged that a party to a telephone conversation could record it, either stenographically or mechanically, without thereby "intercepting" it within the meaning of Section 605 of the Communications Act (355 U.S. at 144).

Devices in Connection with Telephone Service, 11 F.C.C. 1033, 12 F.C.C. 1005, 12 F.C.C. 1008. Since the F.C.C. regulations purport only to regulate the tariff schedules of telephone companies, there is serious question whether they are applicable to the situation in the present case. Furthermore, it is not clear that the device used in the present case was covered by the F.C.C. regulations; the device was apparently an ordinary miniature tape recorder, a "small attachment" to which, located "where the microphone would normally fit", was placed on, or attached to, the exterior of the receiver end of the telephone instrument (see R. 206, 219, 226), permitting the voices to be recorded "by induction" (R. 219). Moreover, since the Commission's orders authorizing the use of telephone recording equipment apply only "in connection with interstate and foreign message toll telephone service" (12 F.C.C. at 1006), the intrastate phone calls in the present case may not be subject to the F.C.C. regulations (cf. Westin, *The Wire Tapping Problem: An Analysis and a Legislative Proposal*, 52 Col. L. Rev. 165, 181). It is also questionable whether a failure to use a tone warning device would subject the user to any enforcement proceedings (see 47 U.S.C. 501, 502); the only sanction might be the termination of service by the telephone company, which would be ineffective with respect to the user of the public telephone in the present case (see F.C.C. Public Notice 66591, dated March 28, 1951, p. 6). Finally, because the issue was not raised below, the evidence in the record does not describe the operation of the recording device used in the present case sufficiently for purposes of facilitating the consideration and resolution of any issue concerning the use of a tone warning device with telephone recording equipment.

Cf. *United States* v. *Fu Ping Jong*, 26 F. Supp. 69 (W. D. Pa.), where the court, in sustaining the admissibility of a phonographic recording of a telephone conversation between an accused and the interpreter of an undercover narcotics

To the extent that *United States* v. *Polakoff*, 112 F. 2d 888 (C.A. 2), certiorari denied, 311 U.S. 653, and *Reitmeister* v. *Reitmeister*, 162 F. 2d 691 (C.A. 2), relied on by petitioners (Pet. 6–7, 10–11), can be said to be in conflict with the decision below,[7] their rationale has been disapproved by this Court in the *Rathbun* case,[8] and they accordingly no longer possess vitality.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1962.

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agent, made with the knowledge of the agent but not of the accused, observed that the recording "was, in effect, a mere recording of the conversation at one end of the line by one of the participants. It differed only in the method of recording from a transcription of a telephone conversation made by a participant" (*id.* at 70).

[7] But see this Court's observation in the *Rathbun* case, 355 U.S. 107, 110, that "[i]t has been conceded by those who believe the conduct here violates Section 605 that either party may record the conversation and publish it", for which the Court cited *United States* v. *Polakoff*, and in particular the acknowledgement in the *Polakoff* decision that "[t]he receiver [of a telephone communication] may certainly himself broadcast the message as he pleases * * *" (112 F. 2d at 889).

[8] See 355 U.S. at 109, and dissenting opinion at 114; cf. opinion below at R. 388–389, Pet. App. A8–A9.